PEOPLE'S LAW CENTER

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MEMORANDUM

July 31, 1984

TO: ACLU Affiliates
Members, Board of Directors of ACLU (National)
Ira Glasser,
Executive Director of ACLU (National)
Mort Halperin, Executive Director of
National Security Project

FROM: Meir Westreich, Member, Board of Directors
of ACLU-Southern California, Member,
ACLU-SC Committee on National Legislation

RE: Policy Proposal of ACLU-Southern California
on CIA-FOIA Bill - H.R. 5164

In reviewing the H.R. 5164 materials (CIA-FOIA Bill) we became concerned about the memorandum from Mort Halperin to Ira Glasser, dated June 15, 1984, on the subject of "Southern California's Questions on H.R. 5164." This memorandum, which apparently was circulated to all of the affiliates and national board members in response to your letter explaining our affiliate's opposition to H.R. 5164, is inaccurate in material respects, and seriously underestimates the damaging aspects of the CIA-FOIA bill.

For the reasons set forth below, ACLU-Southern California urges the national ACLU to reverse its position on H.R. 5164 (even as amended by House committee on July 28, 1984) and oppose its enactment. While such a course of action would be awkward, to say the least, it would nevertheless best serve our mutual goals of preserving the FOIA and the integrity of our constitutional process of judicial review over executive misconduct.

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1. Judicial Review

Mr. Halperin minimizes the significance of the judicial review provisions in H.R. 5164, concluding that:

. . . Thus, although this bill alters normal procedure for discovery with respect to two issues, it will not alter the information we are able to get during litigation.

Finally, contrary to what Ramona's letter implies, the legislation in no way restricts the court's ability to conduct an in camera inspection and the committee report emphasizes this and suggests that courts should conduct in camera reviews when necessary.

A. What limitations on judicial review are in fact enacted by H.R. 5164?

1. Discovery: (Definition: "Discovery" refers to the process by which a litigant obtains information, often from the other litigant, in preparation for trial or hearing on the merits.)

a. Depositions: Any litigant in the federal courts is entitled to take depositions of parties and/or witnesses, by oral or written examination, without court order. Under H.R. 5164, any litigant seeking to enforce its terms may not take any depositions whatsoever, not even by court order.

b. Agency Deposition: Any litigant in the federal courts may take a deposition from a public entity or agency by requiring the entity/agency to produce for deposition a person who has knowledge of a requested subject, and who has authority to speak for the entity/agency. Under H.R. 5164, any litigant seeking to enforce its terms may not depose the CIA, not even by court order.

c. Interrogatories: Any litigant in the federal courts is entitled to submit written interrogatories to any party, without court order. Under H.R. 5164,

any litigant seeking to enforce its terms may not submit any interrogatories whatsoever, not even by court order.

d. Production of Documents: Any litigant in the federal courts is entitled to submit requests to a party that such party produce documents or things for inspection/copying, without court order. Under 5164, any litigant seeking to enforce its terms may not request production of documents or things, not even by court order, unless and until the litigant has already proved his/her claim that the CIA has acted improperly under the terms of H.R. 5164. Production of documents that occurs only after prevailing on the merits is not "discovery."

e. Requests for Admissions: Any litigant in the federal courts is entitled to submit requests to a party that such party admit certain facts. Under H.R. 5164, any litigant seeking to enforce its terms may submit requests for admissions. This is the sole discovery tool permitted under H.R. 5164, and is nearly useless if the litigant cannot employ other discovery tools to (i) obtain information, and/or (2) ask for explanation of any denials.

f. Scope of Discovery: Any litigant in the federal courts may pursue discovery of any information reasonably calculated to lead to relevant evidence, that is not privileged, and which is reasonably accessible to or within the control of the party or witness from which it is sought. Under H.R. 5164, any litigant seeking to enforce its terms has no effective discovery rights whatsoever except to seek confirmation of facts already known to the litigant.

g. Privilege: When a party or litigant asserts that the information sought in federal litigation is privileged, the party asserting the privilege has the burden of asserting it and showing its

applicability; further, the privilege must be asserted by a ranking official, who must make a particularized showing as to each document or subject sought, often subject to in camera review to test the validity of the asserted privilege; further, a spurious assertion of privilege can lead to sanctions against the party or witness asserting the privilege. Under H.R. 5164, any litigant seeking to enforce its terms has no effective discovery rights that can be denied, spuriously or otherwise, and the CIA is relieved of any burden of proof whatsoever.

2. Right to Initiate and Conduct Litigation:

a. Complaint: Any person may file a lawsuit in federal court, on the unverified (unsworn) signature of counsel only, provided the complaint states sufficient facts which, (1) if true, would entitle the plaintiff to the relief sought, and (2) places other parties on notice of charges and relief sought. Only after reasonable discovery may a plaintiff be obliged to support his/her complaint by sworn submissions based upon personal knowledge or admissible evidence (by summary judgment motions). Under H.R. 5164, a litigant seeking to enforce its terms cannot file an action unless he/she is able, prior to filing the lawsuit, to prove his/her case by sworn submissions reflecting personal knowledge or other admissible evidence (presumably referring to the Federal Rules of Evidence).

b. In Camera Hearings: Normally, in camera hearings (in the judge's chambers) are employed to permit the court to examine documents sought by one party when another party or witness claims that the documents are privileged. However, in camera hearings are available only after an action is filed. Under H.R. 5164, in order to file in the first place, a plaintiff must be able to prove his/her case by sworn submissions on personal

knowledge or other admissible evidence, without benefit of any discovery whatsoever. This will limit in camera hearings to those few cases when a litigant seeking to enforce H.R. 5164 can prove a violation prior to filing the action.

c. Hearings on the Merits: In normal federal litigation, the rule provides for personal testimony, with the right of all parties to examine parties and witnesses, whether in court or by deposition which is submitted to the court. Under H.R. 5164, this procedure is all but abandoned:

(1) The court is instructed to employ sworn submissions (affidavits or declarations under penalty of perjury) "to the fullest extent practicable";

(2) All sworn submissions of plaintiffs suing the CIA must be based upon "personal knowledge or otherwise admissible evidence"; however, CIA sworn submissions need only "demonstrat(e) . . . that exempted operational files likely to contain responsive records currently perform the functions" defined as operational records (emphasis added). There is no requirement that the CIA affidavits meet the strict rules of evidence, as required of plaintiffs, and apparently the CIA need only "demonstrate" "current" compliance with the law to meet its burden.

d. Remedies: In most federal litigation, any party who fails to comply in good faith with reasonable discovery requests, or who otherwise willfully or vexatiously multiplies or extends proceedings, or who otherwise engages in dilatory or obstructive tactics, can be assessed various forms of sanctions by the court, to compensate the injured party and to ensure that such conduct will not be repeated. Under H.R. 5164, the sole and

exclusive remedy that the court can order is that the CIA search and review the files that it had improperly failed to review in the first instance; further, it appears that the CIA prevails so long as it is in "current" compliance with H.R. 5164; further, the CIA can require the dismissal of the action, at any time and in its sole discretion, simply by agreeing to make the requested search. Thus, there is no penalty for delay, obstruction, or any violation of H.R. 5164.

B. What should be axiomatic to ACLU is that a right that is not enforceable is hardly a "right" at all.

C. ACLU has numerous policies, and the courts have issued countless rulings, which have deemed discovery as fundamental to due process of law.

D. We know of no other law that bars virtually all discovery to a litigant in an action against a public entity; that requires a litigant to be able to prove his/her case prior to filing the case; that requires one party to conform his/her evidence more closely to the rules of evidence than another party; that bars a federal judge from imposing penalties on parties who deliberately or willfully obstruct, delay or urge frivolous postures; or that permits a party to avoid adverse consequences of its improper conduct by unilateral dismissal.

Discovery in FOIA cases is not as severely restricted as Mr. Halperin suggests. Perfunctory depositions and interrogatories which are designed solely to obtain preliminary information as to whether a particular category of files exists, or the names and titles of custodians or relevant witnesses, can generally be had without too much difficulty, and may be extremely valuable. While this information is collateral and foundational, it is often necessary for a reasonable opportunity to identify the files or documents sought. Furthermore, the burden of limiting discovery under normal rules, and in present FOIA cases, is on the party resisting it, i.e., the CIA.

Mr. Halperin is simply incorrect when he states that a litigant under H.R. 5164 can "suggest" various forms of discovery to the court. The bill expressly bars such discovery altogether, and gives the court no discretion to order that discovery.

Mr. Halperin's contention that discovery limitations under H.R. 5164 apply only to "allegations that documents have been improperly placed solely in designated files or that files have been improperly designated-but not with respect to other issues as whether files relate to the subject matter of an abuse investigation" is simply inaccurate. The precise language of H.R. 5164 is that the discovery limitations apply to " proceedings under paragraphs (3) and (4) of this subsection", to wit: "(3) when a complainant alleges that requested records were improperly withheld because of improper placement solely in exempted operational files" and "(4) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files." These two paragraphs cover the entire gamut of issues relating to "improper placement" and "improper exemption" and are not limited, as stated by Mr. Halperin, to "improper placement and improper designation of exempted files." To put it simply, no litigant seeking to prove that the CIA has conducted abuse investigations which it denies having made will be able to take depositions of CIA employees, or conduct true discovery, to obtain the evidence with which to prove it.

Therefore, ACLU's successful "insistence" on "de novo review" is virtually useless. The only litigants who might conceivably succeed in litigating even the most egregious violations by the CIA will be those with the resources to obtain information by "informal means," and who can afford expensive and exhausting litigation---even when the posture of the CIA is frivolous or illegal on its face.

Thus, we can state categorically, H.R. 5164 will limit the information that will be discoverable in an action under H.R. 5164.

Furthermore, while Mr. Halperin is technically correct that H.R. 5164 does not "restrict the court's ability to conduct an in camera inspection," it does:

1. Vastly reduce, by eliminating discovery, the number of situations in which a litigant can request an in camera inspection--and courts do not generally conduct such inspections without a request;

2. Require a plaintiff to prove his/her case before the inspection will occur--in fact, before a search and review even occurs;

3. Vastly reduce the number of actions that will be filed by raising insurmountable obstacles to many litigants, particularly those of limited means.

What is most disturbing is that ACLU is endorsing, for the very first time, a bill which will effectively immunize a public entity from suit in a substantial area of its responsibility. Forgetting even the subject matter of this bill, ACLU should never support a bill which will establish the precedent of selectively permitting certain litigation tools to be employed in actions against the government. If anything, rules of standing and privilege provide the government with too much protection.

If this bill is enacted, we will see subsequent efforts to limit discovery in other actions against the government. The courts are already too solicitous of the concern over unfortunate public officials overburdened by lawsuits under the Constitution and the Civil Rights Acts, sometimes specifically referring to the burdens of discovery. ACLU does not need to suggest few ways of obstructing such litigation, or undermining its efficiency by elimination of discovery tools.

2. Definition of Operational Files

The CIA has never blanched at conducting illegal activities in the past. Furthermore, the CIA has always engaged, continues to engage, and will likely continue to engage in activities that are deemed lawful by the government, but which we deem to be

violations of constitutionally protected rights, or beyond constitutionally delegated authority. We can therefore assume that such conduct of either ilk will continue for the foreseeable future. Thus, the "definitions" and "restrictions" under H.R. 5164 are only so good as they can be effectively enforced. This bill certainly does not increase such ability to enforce, at least as to those areas addressed by the bill. It in fact reduces substantially the enforcement mechanisms that are otherwise available in all other lawsuits against the CIA.

Assuming that the CIA, from time to time, will conduct itself in bad faith, particularly when it engages in unlawful domestic intelligence work or covert activities, we can also assume that the CIA will find creative means to misinterpret this bill and all of its carefully crafted definitions and restrictions. Without an effective means of judicial review, debates over the meanings of these terms in the bill are a meaningless intellectual exercise.

Furthermore, since when does ACLU codify something into law simply because the courts repeatedly rule in that fashion? Do we support statutes for the death penalty--with perhaps humane means of execution as an "improvement"--because the courts have repeatedly upheld the constitutionality of the death penalty? If the courts become firm in their newly fashioned good faith exception to the exclusionary rule, shall we then help draft legislation that will minimize the impact of the exception, but which also codifies it? If the courts were to restrict discovery by civil rights litigants, beyond enforcement of privileges, would we then codify that into statute as well?

Only one reason is heard for supporting this bill: If we relieve the overburdened CIA of search and review responsibilities as to operational files, they will have more time within which to search and review other files, and therefore be able to make more timely responses to FOIA requests and reduce the existing lengthy backlog. Assuming this to be a fair trade-off (and I do not), what is the justification for also restricting judicial review by adding all those novel restrictions on the judicial proceedings? What did we obtain in exchange for agreeing to those pernicious provisions?

3. CIA Backlog

Mr. Halperin states, with finality: "There was and is no other way (but H.R. 5164) to eliminate the backlog and speed up the process."

To the contrary, steps could be taken immediately which would "eliminate the backlog and speed up the process."

a. Increase Staffing: Congress could always increase staffing provided for FOIA functions.

b. Strengthened Judicial Sanctions: Congress could enact civil and/or criminal penalties (as opposed to the generalized penalties available for all federal litigation) for individuals and/or the CIA when there are willful obstructions or delays in the performance of FOIA responsibilities. Deterence should be a popular philosophy around our "law and order" capital right now.

In any case, even if we cannot obtain these alternative means of eliminating the backlog or speeding up the process, we should not set a precedent under which an agency or Congress can gut a program or law supported by ACLU by simply failing to afford adequate funding or enforcement. Many laws that we have supported have been materially weakened by inadequate funding or enforcement. Sometimes, strengthening occurs at unexpected times, such as the recent, and completely unexpected, strengthening of the Voting Rights Act during the Reagan Administration.

While it is arguable that well-funded organizations will not suffer much under this new bill, the vast majority of Americans and political-social groups will be unable to pursue their rights under H.R. 5164. ACLU should not encourage enactment of laws which presume that ACLU and other civil libertarians will always be able to afford a "National Security Project" or a Mort Halperin.

Recent committee amendments to H.R. 5164 require the CIA to report for two (2) years to Congressional oversight committees concerning efforts to deal with the backlog of FOIA requests. Once again, H.R. 5164 provides no effective means for the public to enforce the provisions of the statute.

The public must instead rely on the subsequent actions of the oversight committees to enforce the CIA's implied promise to reduce the backlog and the response time to FOIA request. Given the fact that these committees have failed to act heretofor on the CIA's notorious failure to respond within existing FOIA time restrictions, the promise of semi-annual reports from the guilty party (CIA) for two (2) years offers little more than one more unenforceable promise of future remedial action.

ACLU-Souhern California does not share the view that H.R. 5164 is not dangerous. If all we had agreed to was the exemption from search and review of operational files, we might agree. Given the unjustified and frightening precedent of enacting such severe restrictions on judicial review, we find the bill to be completely unacceptable, and worthy of our most vigorous efforts to prevent its enactment.

If we fail to oppose the bill, and prevent its enactment, we predict that we will see a repetition of such proposed restrictions on other litigation against the government. Our efforts to prevent such repetition will be severely compromised by our identification with this bill as, in effect, a co-author.

The issues presented by H.R. 5164 justify our full and vigorous efforts at defeating this bill--by whatever means that we can employ to that end, consistent with our own principles.

We suggest therefore that national:

1. Take all feasible steps to reverse national ACLU policy; and

2. Employ our resources to the fullest extent in turning both the Congress and the public against this unwarranted attack on both the FOIA and the judicial system.

MJW/bc:ds